SUPREME COURT, U. S.

MAR 20 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1152

INCORPORATED VILLAGE OF PORT JEFFERSON, ROBERT L. ROBERTSON and ROBERT E. LINK, on behalf of themselves and all others similarly situated owners, taxpayers, voters, residents, electors and citizens, in the Incorporated Village of Port Jefferson, in the Towns of Brookhaven, Smithtown, Huntington, Islip and Babylon, and in every Village to be incorporated in said Towns hereafter,

Appellants,

against

THE BOARD OF SUPERVISORS OF THE COUNTY OF SUFFOLK, the COUNTY TREASURER OF THE COUNTY OF SUFFOLK, and the RECEIVER OF TAXES OF THE TOWN OF BROOKHAVEN,

Appellees.

IN THE MATTER OF THE APPLICATION OF PAUL D. WILLCOX, as Village Treasurer of the Incorporated Village of Port Jefferson,

Appellant,

against

THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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INDEX

	PAGE
MOTION TO DISMISS OR AFFIRM	1
ARGUMENT:	
I—There is no substantial federal question involved	2
II—There was an independent, tenable, nonfederal question that could be the basis for the state court's action	3
CONCLUSION	7

Cases Cited

Board of Supervisors of Suffolk County, New York v. Bianchi, 387 U. S. 97	2
Henry v. State of Mississippi, 379 U. S. 443	3
Incorporated Villlage of Port Jefferson v. Board of Supervisors, 26 A. D. 2d 700	4-6
In Re Collins Estate, 20 Misc. 2d 283	6
Lawrence v. State Tax Commission, 286 U. S. 443	3
Peo. ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48	5
Scott & Co. v. Scott, 186 App. Div. 518	6

New York Constitution

Article 9	4

New York Statutes

Chapter 287 Laws of 1958	5
Municipal Home Rule Law	4

PAGE

Federal Statutes

28 U. S. Code Section 1257 (2) 7

28 U. S. Code Section 2103 7

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THE COUNTY TREASURER OF THE COUNTY OF SUFFOLK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled action and proceeding move, pursuant to Rule 16 of the Revised Rules of the

Supreme Court of the United States, to dismiss on the ground that there is no substantial federal question involved or that the final judgment of the Court of Appeals of the State of New York be affirmed on the ground that although a federal question was raised it was not expressly passed upon and there was an independent, tenable, nonfederal question that could be the basis for the state court's action.

This motion and the argument apply to the action and proceeding as though consolidated.

I

The is no substantial federal question involved.

Appellees concede that the appellants raised and preserved from the outset of this litigation the question of the constitutionality of those sections of the Suffolk County Charter which provide for the county's legislative body and the manner in which the members thereof vote. They would agree, too, that a case having to do solely with that question—a reapportionment case—might present a substantial federal question. Indeed, the appellee Board of Supervisors has been litigating just such a case in the federal courts since 1962 (*Board of Supervisors of Suffolk County* v. *Bianchi,* 387 U. S. 97).[1]

The presence of a substantial federal question in a given case must be considered in the light of the posture of the entire matter before the Court.

Here, what might, standing alone, be a substantial federal problem, is rendered quite insubstantial because the federal problem is but a small facet of the entire case.

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[1] In the lower courts: *Bianchi* v. *Griffing,* 238 F. Supp. 997; 497.

Moreover, inasmuch as the New York Court of Appeals affirmed without opinion (Jurisdictional Statement, C-1-C-3), there is no decision holding the statute to be either consistent or inconsistent with the federal constitution. Thus there is no substantial federal question *presented.*

The appellant's position is that not only were federal questions presented and preserved; they were necessarily involved. Appellees contend both of these factors must be shown and that appellant has failed to establish the federal questions were necessarily involved. A federal question, we submit, is *necessarily involved* (where there is no highest state court opinion) only when the case cannot be disposed of without considering the federal question (*Lawrence* v. *State Tax Commission,* 286 U. S. 276, 52 S Ct 556, 766, Ed 1102).

In *Henry* v. *State of Mississippi,* 379 U. S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408, this Court said: "It is, of course, a familiar principal that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions."

Here, because of the absence of an opinion, there was no specific judgment deciding a federal question. Certainly, as we show below, there were independent and adequate state grounds.

II

The was an independent, tenable, nonfederal question that could be the basis for the State court's action.

This litigation is concerned essentially with the right of a state government to determine what powers shall be possessed respectively by a village and a county. So long

as in the structuring of local governments the state violates no federal rights, the manner in which the state acts in this area is beyond the reach of the federal courts.

In New York villages generally possess the power to perform police functions. Counties generally do not. The state constitution (Article 9) and statutes (e.g. Municipal Home Rule Law) provide means whereby powers possessed by one form of local government can be transferred to another. Before one government gives up a basic function to another, the people have a right to vote on the question.

When the Suffolk County Charter was adopted, certain towns and villages simultaneously voted on the transfer to the county of their police function. One such town which did so was the Town of Brookhaven. At the time, the Village of Port Jefferson was not in existence. Subsequently that village was formed of a part of the Town of Brookhaven which had then transferred its police function to Suffolk County.

The people of the village now want their police function back. Considering this question, the Appellate Division of the Supreme Court said:

> "When the Town of Brookhaven elected to join the County Police District, its election was binding upon the residents of all the town's then unincorporated areas, including the area now included within the plaintiff village. By subsequently incorporating, the residents of the village did not acquire the right to a second vote on the question whether they should join the County Police District. Such second vote would, if permitted, give them unequal and greater rights than the residents of any other towns and villages, who are bound by their orig-

> inal votes; and it would allow them to renege on a commitment made on behalf of all the residents of the Town of Brookhaven when the majority of those residents, including themselves, voted to join the County Police District." (26 A.D. 2d 700, 272 N.Y.S. 2d 617; Appendix to Jurisdictional Statement, p. 19.)

The law which, as the appellants persistently but improperly put it, "took away" their rights, was Chapter 278 of the Law of New York 1958, a bill which created the Suffolk County Charter. The charter contained provisions for the constitution of the legislative body of the county which appellants contend violate the due process and equal protection clauses of the federal constitution.

Appellants contend the charter is inseverable, and that because Sections 201 and 203, the sections having to do with the constitution of the county's legislative body and the manner of voting (Jurisdictional Statement, A-2) are invalid, the entire charter must fall, and with it the law pursuant to which the area that became the plaintiff village gave up (pre-incorporation) its police functions.

The Appellate Division considered the question of severability, saying:

> "Considering the question pragmatically (People ex rel. Alpha P.C. Co. v. Knapp, 230 N.Y. 48, 60), and in light of all the circumstance of the enactment and adoption of the subject charter by an overwhelming majority of the votes of the entire county (including its populous western half which contained more than 90 per cent of the total county population, and which, according to the Bianchi decision, was discriminated against by section 203) we believe the invalidity of section 203 does not re-

> quire the striking down of the entire charter, since we cannot say that the charter would have been rejected had section 203 been exscinded and replaced by some other provision for the legislative body. Indeed, in view of the above-mentioned facts it may well be that the charter would have been adopted by an even more overwhelming majority were section 203 not in it. In our opinion then, the invalidity of section 203 does not invalidate the rest of the Charter." (26 A.D. 2d 700, 272 N.Y.S. 2d 617, Appendix to Jurisdictional Statements, p. 18).

This is clearly a ground—nonfederal—on which the Court of Appeals could have based its decision of affirmance, dismissing the complaint and petition.

While sometimes appellate courts in New York affirm without opinion "on the decision of the court below", or on the opinion of a particular judge, that state abides by the general rule that "affirmance of an order on appeal, without opinion, indicates that the correct result was reached, but does not indicate that the appellate court necessarily agreed with the reasoning which may have produced the decision * * *" (Vol 5B C.J.S. 559), *Scott & Co.* v. *Scott,* 186 App.Div. 518, 526, 174 N.Y.S. 583, 588; *In re Estate of Collins,* 20 Misc. 2d 283, 195 N.Y.S. 2d 898.

Since, then, the decision of the New York Court of Appeals could have been based on a finding the provisions of the Charter are severable, notwithstanding the possibility of the unconstitutionality of §§ 201 and 203, there is no sound and valid basis for finding probable jurisdiction. Indeed, appellees contend the appellants proper remedy was by way of certiorari rather than appeal.

We submit there was *not* "drawn in question the validity of a statute of [the] state on the ground of its being

repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity" and that therefore 28 U.S.C. § 1257(2) is not the proper route.

Even if this Court should dismiss the appeal but consider granting certiorari under 28 U.S.C. § 2103, we contend it should not do so. First, the basic federal question is already in the federal courts in the Bianchi case (argument before the United States Court of Appeals for the Second Circuit was had March 12, 1968), so that there is no reason to exercise the equitable power of the Court, and the absence of an opinion in the State's highest court fails to provide, with independent basis for the decision present, the necessary foundation.

CONCLUSION

As 28 U.S.C. § 1257(2) is interpreted by the decisions of this Court there is in this case no substantial federal question involved, and appellee's motion to dismiss the appeal should be granted.

Alternatively, the final judgment of the New York Court of Appeals should be affirmed on the ground that although a federal question was raised it was not expressly passed upon and there was an independent, tenable, nonfederal question that could be the basis for the judgment of New York's highest court.

Respectfully submitted,

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